

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARY D. POTTER)	
Claimant)	
VS.)	
)	Docket No. 208,736
CONSOLIDATED FREIGHTWAYS, INC.)	
Respondent)	
Self-Insured)	

ORDER

Respondent requested Appeals Board review of the Award entered by Assistant Director Brad E. Avery on March 17, 1997, and the Order Nunc Pro Tunc entered on March 19, 1997. The Appeals Board heard oral argument in Kansas City, Kansas, on August 19, 1997.

APPEARANCES

Claimant appeared by his attorney, Gary L. Jordan of Ottawa, Kansas. Respondent, a qualified self-insured, appeared by its attorney, David F. Menghini appearing for William A. Wolff of Kansas City, Kansas. There were no other appearances.

RECORD

The Appeals Board considered the record as set forth in the Award of the Assistant Director.

STIPULATIONS

The Appeals Board considered the stipulations in the Award of the Assistant Director. In addition, the parties agreed to a gross average weekly wage for claimant in the amount of \$1,183.22 in a stipulation filed December 3, 1996.

ISSUES

Respondent raised the following issues for review by the Appeals Board:

- (1) Nature and extent of claimant's disability.
- (2) Whether claimant was overpaid temporary total disability compensation from March 30, 1996, through May 27, 1996, for 7.42 weeks at \$326 a week in the sum of \$2,418.92.

At oral argument before the Appeals Board, the claimant raised the following issue:

- (3) Whether claimant is entitled to the unauthorized medical expense in the statutory maximum amount of \$500.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

- (1) The respondent does not dispute that claimant sustained a low back injury on October 2, 1995, while performing his regular work duties for the respondent. On the date of accident, claimant was 49 years of age, had been employed by the respondent as a truck driver for nine years, and had been employed in the occupation of a truck driver for a total of 28 years. Claimant testified that he had a seventh grade education and could read but was limited in writing and spelling.

Following claimant's accident, he testified that respondent provided him with medical treatment for his low back injury primarily through Pedro A. Murati, M.D., board certified in rehabilitation and physical medicine, located in Wichita, Kansas. Dr. Murati treated claimant from November 1995 until he released claimant on March 29, 1996. Dr. Murati diagnosed claimant with a L5-S1 disc herniation, right L4 radiculopathy, left L5 radiculopathy, and probable right S1 radiculopathy. Claimant received conservative treatment in the form of injections, medication, and physical therapy. Dr. Murati released claimant on March 29, 1996, to return to work eight hours per day with the permanent restrictions contained in a functional capacity evaluation (FCE) performed on March 26, 1996. That FCE contained extensive permanent physical restrictions that limited claimant's physical movements as well as his lifting activities. Dr. Murati also assessed claimant with an 11 percent permanent functional impairment rating based on the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, (Revised).

At the request of claimant's attorney, claimant was examined and evaluated by Sergio Delgado, M.D., an orthopedic surgeon in Topeka, Kansas. Dr. Delgado saw claimant on May 28, 1996, and July 17, 1996. During the May 28, 1996, examination, Dr. Delgado diagnosed claimant with a herniated disc at L5-S1 with nerve impingement

affecting his lower extremities. Dr. Delgado opined that an alternative to the claimant's conservative treatment for his low back injury would have been surgical decompression and disc excision. However, Dr. Delgado further opined that even with the surgery, claimant would not have been able to return to his truck driving activities. Dr. Delgado had the benefit of the medical records from claimant's treating physician, Dr. Murati, and agreed with the permanent restrictions found in the FCE. After Dr. Delgado examined the claimant on July 17, 1996, he assessed claimant with a 24 percent permanent functional impairment utilizing the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, (Revised).

The record establishes that claimant is now physically unable to perform the truck driving job activities. The record also establishes that the respondent did not offer claimant an accommodated job in order to return claimant to work at 90 percent or more of his pre-injury wage. Accordingly, claimant is entitled to a work disability, if the work disability exceeds claimant's functional impairment. See K.S.A. 44-510e(a). The respondent does not question claimant's eligibility for a work disability. What the respondent argues is the credible evidence in the record establishes a lower work disability than was found by the Assistant Director.

The Assistant Director found, following the payment of temporary total disability benefits, that claimant was entitled to an 81 percent work disability for 18.43 weeks and thereafter a 78.5 percent work disability for 254.46 weeks making a total award of \$100,000, the maximum payable under K.S.A. 44-510f(a)(2).

Both the claimant and the respondent retained vocational experts to interview the claimant and express their respective opinions on the two components of the work disability test contained in K.S.A. 44-510e(a). Mr. Monty Longacre was retained by the claimant and Mr. Gary Weimholt was retained by the respondent. Mr. Longacre interviewed the claimant personally and Mr. Weimholt interviewed the claimant by telephone. Both experts had available the permanent restrictions contained in the FCE that were adopted by both Dr. Murati and Dr. Delgado as claimant's appropriate post-injury permanent restrictions.

Dr. Delgado reviewed the work task list compiled by Mr. Longacre and agreed with Mr. Longacre's opinion that claimant, post-injury, could not perform 9 out of the 13 work tasks resulting in a 69 percent loss of claimant's work tasks performing ability. During cross-examination by the respondent, Dr. Delgado was given the opportunity to review the work task list compiled by Mr. Weimholt. Dr. Delgado opined that the claimant could not perform 7 of the 13 work tasks compiled by Mr. Weimholt for a 54 percent loss of ability to perform work tasks.

Dr. Murati, during his deposition testimony, reviewed the work task list developed by Mr. Weimholt and opined claimant could not perform 4 out of the 13 work tasks resulting in a 31 percent loss of claimant's work task performing ability. During cross-examination by the claimant, Dr. Murati agreed from a review of Mr. Longacre's work task list, claimant

was unable to perform 9 out of 13 work tasks resulting in a 69 percent loss of claimant's work tasks performing ability.

At the regular hearing, claimant testified he was currently employed part-time as a Pizza Hut delivery person in Emporia, Kansas. He was earning \$4.75 per hour working approximately 12 to 20 hours per week plus tips. Claimant testified that he was responsible for using his own automobile and he was required to supply his own gas and maintenance for the automobile. Claimant testified he spent his tips for the gas and the maintenance of the automobile.

Respondent argues that claimant has established by his testimony that post-injury he was earning \$125 per week. The respondent calculates claimant's post-injury wage as a Pizza Hut delivery person as working 20 hours per week at \$4.75 per hour or \$95 plus \$30 per week in tips for a post-injury average weekly wage of \$125. The respondent then compares the \$125 post-injury average weekly wage with claimant's stipulated pre-injury average weekly wage of \$1,183.22 and arrives at an 89 percent wage loss.

Because Dr. Murati was claimant's treating physician, the respondent contends his opinion on the work task loss is the most persuasive and credible evidence in the record. Therefore, the respondent argues that Dr. Murati's work task loss opinion of 31 percent should be averaged with claimant's wage loss of 89 percent as required by K.S.A. 44-510e(a), entitling claimant to a 60 percent work disability.

The Appeals Board disagrees with the respondent and finds that the appropriate loss of claimant's work tasks performing ability should be arrived at by giving equal weight to Dr. Murati's work task loss opinion of 31 percent as compiled by Mr. Weimholt with Dr. Delgado's work task loss opinion of 69 percent as compiled by Mr. Longacre, resulting in a work task loss of 50 percent.

The Appeals Board finds claimant's wage loss is best represented by comparing his actual earnings post-injury with the stipulated preinjury average weekly wage of \$1,183.22. Claimant established through his testimony that he had made a reasonable effort to find other employment following his release for restricted employment by Dr. Murati. Claimant testified the only employment he was able to find within his permanent restrictions was the Pizza Hut delivery job. Claimant established through his testimony he was working 12 to 20 hours per week for an average of 16 hours at \$4.75 per hour plus tips. Tips should not be included because claimant established the tips were used for gas and maintenance for the delivery car, thus tips equalled expenses. The Appeals Board finds claimant's post-injury weekly wage was \$76 and when compared to his pre-injury average weekly wage of \$1,183.22, the result is a 94 percent wage loss. Then, as required by K.S.A. 44-510e(a), claimant's work task loss of 50 percent is averaged with his wage loss of 94 percent entitling the claimant to a work disability after October 2, 1996, in the amount of 72 percent. For the weeks commencing March 30, 1996, through October 2, 1996, claimant was unemployed and thus had a 100 percent wage loss which establishes a work disability in the amount of 75 percent.

(2) Respondent argues that claimant was overpaid temporary total disability compensation from the date claimant was released with permanent restrictions by Dr. Murati on March 29, 1996, until the last date he was paid temporary total disability compensation on May 27, 1996. This would represent an overpayment of 7.42 weeks at \$326 per week for a total of \$2,418.92.

Temporary total disability compensation is listed in the Award by the Assistant Director as an issue raised by the claimant for an additional payment of one week from April 30, 1996, through May 6, 1996. The Assistant Director's Award ordered the respondent to pay this additional week. However, on appeal the claimant withdrew the request indicating he had received that week of temporary total disability compensation.

With respect to the overpayment issue raised by the respondent, the claimant objects because the issue was not raised or discussed until the respondent submitted its submission letter to the Administrative Law Judge. In that letter, the respondent did not raise overpayment of temporary total disability compensation as a specific issue. The only time the overpayment is mentioned is in the arguments set forth in the letter.

The Appeals Board finds the temporary total disability overpayment issue is irrelevant because the percent of work disability found in this order would otherwise qualify the claimant for the maximum benefit limit of \$100,000 even if the 7.42 weeks of temporary total disability compensation were credited. Therefore, the Appeals Board denies respondent's request for the temporary total disability credit.

(3) The Assistant Director in the Award listed unauthorized medical as an issue but did not make an order in reference to the issue. The Appeals Board finds that upon proper presentation of the appropriate medical expense that the respondent is ordered to pay unauthorized medical expense up to the statutory limit of \$500.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Brad E. Avery dated March 17, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gary D. Potter, and against the respondent, Consolidated Freightways, a qualified self-insured, for an accidental injury which occurred on October 2, 1995, and based upon an average weekly wage of \$1,183.22.

Claimant is entitled to 32.86 weeks of temporary total disability compensation at the rate of \$326 per week or \$10,712.36 followed by 19.43 weeks of permanent partial disability benefits at \$326 per week or \$6,334.18 for a 75% permanent partial disability, the remaining

balance of \$82,953.46 is ordered paid at the rate of \$326.00 per week until paid in full, making a total award of \$100,000.

As of September 20, 1997, there is due and owing claimant 32.86 weeks of temporary total disability compensation at the rate of \$326 per week or \$10,712.36 and 19.43 weeks of permanent partial disability compensation at \$326 per week or \$6,334.18 plus 50.42 weeks of permanent partial compensation at the rate of \$326 per week in the sum of \$16,436.92 for a total of \$33,483.46, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$66,516.54 is to be paid for 204 weeks at the rate of \$326 per week and for 1 week at \$12.54, until fully paid or further order of the Director.

Claimant is entitled to future medical treatment upon proper application to and approval by the Director.

Claimant is entitled to the unauthorized medical expense upon presentation of the expense to the statutory limit of \$500.

Claimant is entitled to reimbursement for medical care in the amount of \$13.26 for an authorized prescription.

All remaining orders of the Assistant Director as set forth in his Award are adopted by the Appeals Board that are not inconsistent with this order.

IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary L. Jordan, Ottawa, KS
William A. Wolff, Kansas City, KS
Julie A. N. Sample, Administrative Law Judge
Brad E. Avery, Assistant Director
Philip S. Harness, Director